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No. 93-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 84,
Petitioner,
v.
GEORGIA POWER COMPANY,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an Arbitrator's monetary award which did not compensate employees for any economic loss may be upheld, even though the Arbitrator specifically found that punitive damages were not warranted.

II. Whether a party seeking vacation of an arbitration award can be considered to have abandoned a defense that punitive damages are improper when it pressed that defense continuously in arbitration proceedings.

III. Where a court holds that an Arbitrator's award of monetary damages (in the absence of actual economic loss) violates his own findings that punitive damages are not necessary, whether such a holding constitutes a finding of a "mistake of law" by the Arbitrator that would preclude vacation of the award.

IV. Whether this Court should exercise its discretion to review a fact-specific decision of the Eleventh Circuit Court of Appeals which simply relied on the Arbitrator's own findings of fact and rationale and applied existing and controlling law.

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CITATIONS OF REPORTED OPINIONS IN THE COURTS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 995 F.2d 1030 (1993). The decision and Order of the United States District Court for the Northern District of Georgia is reported at 825 F. Supp. 1023 (1992).

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STATEMENT OF THE CASE

Introduction

Georgia Power Company[1] (hereafter "Company") is engaged in the generation, transmission and distribution of electricity, serving over 95 percent of the counties in the State of Georgia. Effective July 1, 1987, the Company and Petitioner International Brotherhood of Electrical Workers, Local 84 ("Union") executed a collective bargaining agreement entitled "Memorandum of Agreement between Georgia Power Company and Local Union No. 84 of the International Brotherhood of

[1] In accordance with Supreme Court Rule 29.1, Georgia Power Company's parent company is The Southern Company.

Electrical Workers" ("Collective Bargaining Agreement" or "Agreement"). This Agreement was in force during all times material to this action, and covered approximately 6,000 employees in a statewide bargaining unit. Paragraph 65 of the Agreement provided for arbitration of certain disputes between the Company and the Union. 825 F. Supp. 1023, 1024 (N.D. Ga. 1992). That paragraph provided that the "Arbitration Board shall not interpret this Agreement in any manner so as to amend or supplement this Agreement." The Agreement also provided expressly for backpay remedies, but made no provision for punitive damages. (Complaint, Exh. A).[2]

Statement of Facts

During the first six months of 1988, the Company and the Union conducted negotiations regarding the Company's proposed implementation of a Pilot Team Incentive Program ("Program"), an incentive pay program designed to increase operating efficiency and performance. The Program proposed by the Company was to operate on a trial basis at two locations, thereby including only a portion of the bargaining unit. The Union refused to agree to any incentive pay program which did not cover the entire bargaining unit, or which did not spread the bonuses earned by some employees to all the unit's employees. Due to the pilot nature of the Program, and the significant risks created, a trial period in select locations was an absolute prerequisite for the Company to any future inclusion of the entire bargaining unit.

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[2] Respondent cites to the record as follows:

1) The reported opinions of the Eleventh Circuit and District Court listed on page vii herein,

2) The Stipulation of Record filed in the District Court on August 20, 1991 in which both parties agreed that the documents attached thereto were true and correct copies and would be admitted into evidence before the Court to be considered by the Court in reviewing any and all dispositive motions,

3) The initial Complaint filed in the District Court by the Respondent herein on January 4, 1991.

825 F. Supp. at 1028. Moreover, spreading any bonus monies from the Program participants to non-participants would have negated the incentive effort of the Program, thereby defeating the whole purpose of the Program and rendering the test program meaningless. (Stipulation of Record, Exh. A, pp. 146, 170, 221).

Following an impasse in negotiations, the Company in good faith unilaterally implemented the proposed Program for employees at its Plant Bowen and in its Macon Division. 825 F. Supp. at 1024.[3] In August 1988, the Union filed a grievance regarding the Company's implementation of the Program. The Company denied this grievance, and pursuant to Paragraph 65 of the Agreement, the parties submitted their dispute to arbitration. The Arbitration Board was composed of a Company arbitrator, a Union arbitrator, and Ferrin Y. Mathews, a neutral arbitrator selected by agreement of the parties. *Id.* at 1024, 1025.

By the end of 1988, annual bonuses in excess of 14 percent were earned for all employees at Plant Bowen due to increased savings in plant operations. In the Macon Division, however, bonuses of less than two percent were earned. In early 1989, the bonuses for 1988 were paid out, and the Union publicly encouraged its members to accept payment, which they did. The Program continued through 1989 at both locations.

The Arbitration Board held an evidentiary hearing regarding the parties' dispute on September 16, 1989. At the hearing and in post-hearing briefs, the Union requested that the Arbitrator award the same percentage of bonus pay earned by the Plant Bowen employees to all the non-participating bargaining unit employees. The Company responded that such an award would constitute punitive damages, and was not permissible under the Agreement. (Stipulation of Record, Exh. E-28).

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[3] Under the Program, the Company paid employees at Plant Bowen and in the Macon Division fifty percent of the savings they generated. The savings generated were measured according to formulas developed by the Company that were specific to each location. *Id.*

On February 7, 1990, Arbitrator Mathews issued a Tentative Opinion and Award, which at the time was neither a final decision of the Arbitration Board nor a binding award. In the Tentative Opinion and Award, Arbitrator Mathews found that the Company's implementation of the Program violated the collective bargaining agreement. 825 F. Supp. at 1025. Mathews first determined that the cash awards the Company had paid out under the Program constituted "wages" and "rates of pay," which are mandatory subjects of bargaining under the Agreement. *Id.* He further found that these cash awards altered the wage schedules which had been negotiated by the Company and the Union. *Id.* Mathews thus concluded that the Company had violated the Agreement by altering the negotiated wage schedules without the consent of the Union. *Id.*

Arbitrator Mathews, however, rejected the Union's request that he award "the same percentage of wages, as that which was paid to the employees at Plant Bowen, to all of the Company's employees system-wide." *Id.* Arbitrator Mathews concluded that no basis existed to support an award of monetary damages:

> As also contended by the Company, no employee of the Bargaining Unit has suffered a monetary loss. For the year 1988, the Company paid to the participating employees that amount due them under the Program. The remaining members of the Bargaining Unit did not participate in the Pilot Incentive Pay Program, and hence were promised nothing by the Company. Since it has been found that the action of the Company in implementing the Program was wrongful, the employees, at locations other than Plant Bowen and the Macon Division, would have no legal basis to compel any payment from the Company.

Id. In so holding, the Arbitrator also explicitly found that (1) the Program had been successful and the participating employees worked "harder and smarter," (2) the participants had earned

their bonuses, and (3) the Company had acted in good faith in implementing the Program. Mathews found that the issuance of an award to employees who did not participate in the Program would be "in the nature of a penalty, and would not 'make whole' employees for a monetary loss suffered." *Id.* The Tentative Award did not order the Company to cease further bonus payments owed for results already achieved.

On February 12, 1990, the Arbitration Board held an executive session. At that session, the Company Arbitrator informed the Board that immediately before receipt of the Tentative Opinion and Award, Georgia Power had begun making payments under the Program for the year 1989. *Id.* The Union arbitrator argued that these payments were undertaken in bad faith and once again urged Arbitrator Mathews to require the Company to pay monetary damages. However, the Union did not ask that the payments be stopped, and the Union encouraged its members to accept the payments. (Stipulation of Record, Exh. D-1, p.3) Arbitrator Mathews then ordered further briefing on the question of whether Union members who did not participate in the Program were entitled to monetary relief. On March 8, 1990, the parties submitted briefs on that issue.

On April 27, 1990, Arbitrator Mathews issued a Reconsideration of and Addendum to Opinion and Award Rendered February 7, 1990 ("Addendum"). In this Addendum, Arbitrator Mathews concluded that the Company should be required to pay monetary damages to Union members who did not participate in the Program. He ordered the following remedy:

> The Company is ordered to immediately determine the amount of money paid to the Bargaining Unit employees participating in the Incentive Pay Program for the years 1988 and 1989 at Plant Bowen and in the Macon Division. That amount, so determined shall constitute the amount of money which the Company shall immediately pay to the Bargaining Unit employees who did not participate in the

> Incentive Pay Program. The payment to said employees shall be by the same method and on the same method utilized by the Company in making the payment to the Bargaining Unit employees at Plant Bowen and in the Macon Division.

825 F. Supp. at 1025, 1026.

Arbitrator Mathews adhered to his original conclusion that "no employee of the Bargaining Unit, not a part of the Program, has suffered a monetary loss as that employee had not been promised anything by the Company." *Id.* at 1026. Moreover, he again found no bad faith by the Company in implementing the Program or making the payments. However, upon reconsideration, he concluded that those employees "may have suffered monetary loss on another basis." *Id.* Arbitrator Mathews reached this conclusion on the basis of Paragraph 69 of the Agreement, entitled "Non-Discrimination," and Paragraph 50 of the Agreement, entitled "Wage Rates." *Id.* Arbitrator Mathews found that the Company had violated Paragraph 69 by altering the wage of selected employees, i.e., the non-participants in the Program. *Id.*

Since Paragraph 69 had never been the subject of the prior testimony and briefing, nor been placed at issue, by letter dated May 2, 1990, the Company Arbitrator requested an executive session of the Arbitration Board. (Stipulation of Record, Exh. R, pp. 2-3). On June 18, 1990, the Arbitration Board held a hearing regarding the scope and meaning of Paragraph 69. The Company argued that the provision applies only to discrimination "on account of race, creed, color, sex, age (40 and over), national origin, handicap or status as a veteran," and no evidence was presented to the contrary. On October 8, 1990, Arbitrator Mathews issued an opinion in which he declined to modify the remedy he had ordered, although the only evidence presented established that the exclusive intent of Paragraph 69 had been to prohibit trait-based discrimination (e.g. race, age, sex). (Stipulation of Record, Exh. R, pp. 4-6). The Union Arbitrator concurred in this opinion, thereby making it a final and binding decision of

the Arbitration Board. 825 F. Supp. at 1026. The Arbitrator's Award ordered the Company to pay approximately $2.7 million to all of the bargaining unit employees who did not participate in the Program. (Stipulation of Record, Exh. R., p. 20).

Court Proceedings Below

On January 4, 1991, Georgia Power filed a complaint under 29 U.S.C. § 185 seeking to vacate that portion of the arbitration award which requires it to pay monetary damages to Union employees who did not participate in the Pilot Incentive Pay Program. The Company advanced four primary bases for vacation of the award: (1) the monetary remedy ordered by the Arbitration Board constitutes an unauthorized award of punitive damages; (2) the award conflicts with the Collective Bargaining Agreement because it exceeds the Arbitration Board's authority to award back pay and because the award itself violates the wage schedules set forth in the Agreement; (3) no evidence exists to support the Arbitrator's construction of Paragraph 69 of the Agreement; and (4) the award is irrational. 825 F. Supp. at 1026, 1027.

On June 4, 1992, the District Court entered an Order vacating the damages portion of the Award, finding that the $2.7 million constitutes impermissible punitive damages. The District Court chose not to address the other grounds for vacating the Award. 825 F. Supp. 1023. On July 16, 1993, the Eleventh Circuit issued an opinion affirming the decision of the District Court, and noting that an Arbitrator's denomination of an award as compensatory will not prevent the court from determining that the award is in fact punitive. 995 F.2d 1030, 1032 (11th Cir. 1993).

SUMMARY OF ARGUMENT

The Eleventh Circuit properly affirmed the District Court's order vacating the $2.7 million award in issue because it conflicted with the Arbitrator's findings and failed to draw its essence from the collective bargaining agreement in issue. The Union's Petition for Writ of Certiorari seeks to concoct a split in the Circuits and a

conflict with Supreme Court precedent which does not exist. First, the Union argues that the Eleventh Circuit's decision is contrary to established authority concerning the standard necessary to permit the awardance of punitive damages by an Arbitrator. The Eleventh Circuit properly found irrelevant or inapplicable the cases now relied upon by the Union, because in this matter the Arbitrator himself found that *punitive damages were not appropriate.* Hence, the validity of his award depended upon the Union's ability to establish that the damages were actually compensatory rather than punitive in nature. The Union failed to show a causal relationship between the breach of the Agreement and the claimed loss, a prerequisite to establishing compensatory damages.

Second, the Union has asserted that the Eleventh Circuit's opinion conflicts with the standards established by other circuits concerning waiver of an argument by a party at the arbitration level. Again, the cases relied upon by the Union are distinguishable from the instant matter, because the Company *never* acquiesced in the awardance of any damages that were punitive in nature. The Union's assertion that the Company's only position at the June 18, 1990 hearing addressed the meaning and effect of the non-discrimination clause of the Agreement disregards the fact that, at the time of that hearing, the Arbitrator had already found in the Company's favor on that issue — by deciding that punitive damages were not warranted.

Finally, the Union's argument that the Eleventh Circuit's opinion conflicts with Supreme Court jurisprudence is misplaced. The District Court (and the Eleventh Circuit) properly found that the Arbitrator's award did not draw its essence from the collective bargaining agreement, because the money damages were not compensatory, and because he found that punitive damages were not warranted under the circumstances.

REASONS FOR DENYING THE WRIT

I. PURPORTEDLY CONFLICTING CASE LAW CONCERNING THE STANDARD NECESSARY TO AWARD PUNITIVE DAMAGES IN A LABOR ARBITRATION IS IRRELEVANT, BECAUSE THE ARBITRATOR IN THIS CASE FOUND THAT PUNITIVE DAMAGES WERE NOT WARRANTED.

The Union has failed to identify a split in the jurisprudence of the various Circuit Courts that is *relevant to the outcome of this matter*. All of the cases that the Union cites concerning purportedly varying Circuit Court standards on permitting punitive damages either involved statutory damages or contracts with broad remedy clauses, involved findings of bad faith or fraud, or involved nominal or small awards to compensate a union for its costs. In contrast, in the instant matter, Arbitrator Mathews found repeatedly that the Company had not engaged in the bad faith or willful or wanton conduct otherwise necessary for punitive damages, and that punitive damages were not appropriate. 995 F.2d at 1032. The Arbitrator's refusal to award punitive damages clearly "draws its essence" from the Agreement, which only provides for backpay. This refusal should not be overturned because of the absence of legal support for punitive damages in the collective bargaining context.

The Union does not dispute that in the context of labor arbitration, "[g]enerally, the remedy for breach of a collective bargaining agreement is limited to an award of compensatory damages . . . . [T]o be compensatory, there must be a causal relationship between the Company's violation and the loss claimed by the employee . . . . An award that exceeds the monetary loss which an injured party suffered as a result of an agreement breach is considered punitive." *Howard P. Foley Co. v. Int. Bro. of Elec. Workers,* 789 F.2d 1421, 1423 (9th Cir. 1986), following *Desert Palace v. Local Joint Executive Board of Las Vegas,* 679 F.2d 789, 794 (9th Cir. 1982); *Westinghouse Electric Corp., Aerospace Division v. Int. Bro. of Elec. Workers Local 1805,* 561 F.2d 521, 523-24

(4th Cir. 1977), *cert. denied,* 434 U.S. 1026 (1978). As the courts below found, Arbitrator Mathews made no findings as to what the position of the non-participating employees would have been in the absence of a violation, omitting an essential element of any compensatory award, and his opinion "fail[ed] to establish a causal relationship between the Company's violation of the Agreement and any monetary loss on the part of employees who did not participate in the Pilot Incentive Pay Program." 825 F. Supp. at 1028.

This distinction between compensatory and punitive damages is well-grounded in national labor policy and Supreme Court precedent. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 198, 61 S.Ct. 845, 854 (1941) ("only actual losses should be made good"). The policies of the National Labor Relations Act ("NLRA") are "essentially remedial." *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 10, 61 S.Ct., 77, 78-79 (1940). "The Board's task is to craft an order, and an appellate court will ordinarily enforce it, unless the order is viewed as penal or confiscatory." *Manhattan Eye Ear & Throat Hosp. v. NLRB,* 942 F.2d 151, 156-57 (2d Cir. 1991); *Carpenter Sprinkler Corp. v. NLRB,* 605 F.2d 60, 67 (2d Cir. 1979). Under the NLRA, a "remedy must be sufficiently tailored to expunge only the *actual,* and not merely *speculative* consequences of the unfair labor practices." *Sure-Tan v. NLRB,* 467 U.S. 883, 900, 104 S.Ct. 2803, 2813 (1984) (emphasis in original).

As the courts below held and the Union does not dispute, (1) the Arbitrator failed to address what position the non-participants would have been in the absence of the Company's violation of the Agreement, (2) the Arbitrator failed to find the Program would have been implemented Company-wide under any circumstances, (3) the Arbitrator failed to find the Company would have implemented the Program Company-wide without first conducting the pilot, and (4) the Arbitrator failed to include a finding of a Company-wide incentive pay program absent the pilot in order to establish causation. As the lower courts found, in the absence of these critical findings, the award could only be punitive in nature. 825 F. Supp. at 1028-1030.

In the face of such findings of fact by the Arbitrator and well-established case law, the Union's case has repeatedly rested on wholly irrelevant and disparate decisions.

In *Hygrade Operators v. Local 333,* 945 F.2d 18 (2d Cir. 1991), which involved an illegal lockout by the employer, the contract gave the arbitrator "full authority . . . to fashion any appropriate remedy." *Id.* at 20-26. The union sought $100,000 and an apology for the "injured feelings" of the locked out employees. *Id.* at 21. No evidence of monetary damages was produced, and the arbitrator decided not to award any such damages. However, he awarded $50,000 to compensate the union for expenses incurred by the union in being forced to strike due to the lockout. The arbitrator noted that the amount represented only a fraction of the union's costs incurred. *Id.* at 21.

The court of appeals upheld the award despite the absence of evidence of monetary damages, finding that under the broad remedy clause,

> [t]he arbitrator was nonetheless entitled to conclude that the employer's preemptive lockout weakened the union's bargaining position both at the juncture of the on-going labor controversy and in the aftermath, with resulting economic damage to the union, and to approximate the damages as the circumstances allowed.

Id. at 24.

The distinctions are apparent. *First,* unlike the relevant contract provisions in the instant matter, a contractual provision explicitly allowed any remedy. *Second,* the court viewed the award as compensatory based on expenses, and, *again,* it was paid to the union, rather than the employees as compensation. *Third,* the award was small and only a fraction of the possible amount, and not a speculative amount of several million dollars. *Fourth,* the court noted that the breach had been economically motivated to

rob the union of its right to strike. *Id.* at 24. The Union here made no assertion of anti-union animus.

The Sixth Circuit's decision in *Eberhard Foods, Inc. v. Jerome Handy,* 868 F.2d 890, 892-93 (6th Cir. 1989), is equally inapplicable to this case. It involved a discharge case where the arbitrator reinstated the employee without back pay and the court simply upheld the right of arbitrators to fashion reinstatement remedies when just cause for discharge did not exist. The case does not speak to the facts of the instant matter, particularly since the Arbitrator specifically found that punitive damages were not appropriate and there was no authority to move beyond a back pay award.

In *Goss-Golden West Sheet Metal, Inc. v. Sheet Metal Workers Int'l Local 104,* 933 F.2d 759 (9th Cir. 1991), a joint employer-union association arbitration board decided grievances where the employer had hired an employee outside of the hiring hall and did not make the proper benefit contributions to trust funds, and the employer paid the wrong wage rate on 14 commercial building projects. The employer board members, along with the union members, voted unanimously against the employer, and awarded $70,000.

The employer contended the award requiring that benefits and back wages be paid was punitive. The court noted most of the award was compensatory, but held that even if punitive, the contract's language gave the board the authority to award punitive damages. The clause read that the arbitration panel is "empowered to . . . grant such relief . . . as [it] deem[s] necessary and proper, including awards of damages or other compensation." *Id.* at 764. Again, this case is distinguishable alone by the presence of an explicit remedy clause, which is not present in the instant matter. In addition, there was only a small award, versus the multi-million dollar award at issue here.

Finally, the Union's reliance on *Int'l Bhd. of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 117, v. Washington Employers, Inc.,* 557 F.2d 1345, 1349-50 (9th Cir.

1977), is particularly mystifying. The parties specifically asked the arbitrator to consider the appropriate statutory damages under state law, and then sought review based upon what they contended was his erroneous application of that law. The case never addressed the issue of punitive damages. Here, Georgia Power argued vehemently that punitive damages were not appropriate, while the Union argued that they were. The Arbitrator agreed with Georgia Power on that issue.

It is significant that the Union has elected not to continue to rely on the Eleventh Circuit's decision in *Willoughby Roofing and Supply v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984), aff'd on the basis of the district court's opinion, 776 F.2d 269 (11th Cir. 1985). The Union relied on *Willoughby* extensively below, but both the District Court and the Court of Appeals found the decision unsupportive of the Union's claim that punitive damages were authorized under the Agreement. The reason for the Union's abandonment of *Willoughby* is clear: It represents controlling Eleventh Circuit precedent which is entirely consistent with the relevant holdings of other Circuits, and supportive of the Eleventh Circuit's holding below.

The Union first relied on *Willoughby* in arguing that the Eleventh Circuit allows punitive damages awards when the Agreement does not explicitly prohibit them. *Willoughby* was a construction arbitration case where the plaintiff sought compensatory and punitive damages for breach of contract and fraud arising from a roofing job. The contract had an arbitration clause which did not address remedies, but which applied the American Arbitration Association ("AAA") Construction Arbitration Rules. Rule 43 of the AAA Rules authorizes an arbitrator to "grant *any remedy or relief* which is just and equitable." *Willoughby*, 598 F. Supp. at 355-56 (emphasis added). Based on AAA Rule 43, and distinguishing the labor arbitration precedent in *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979) (punitive damages prohibited where no evidence breach of agreement caused monetary loss to union employees), the district court

found that the contract authorized the award of punitive damages. *Willoughby,* 598 F. Supp. at 357.

The district court in *Willoughby* made two important distinctions from *Webster Clothes. First,* it held that *Willoughby* is controlled by the Federal Arbitration Act, as opposed to labor arbitration rules. *Second,* the court stated that *Webster Clothes* had not "actually involved factual findings or allegations sufficient to support the award of punitive damages under applicable substantive law. The case *sub judice* is decidedly different in this respect." *Id.* at 358 n.9.

Thus, the central distinctions here are that *Willoughby* (1) was a construction arbitration case controlled by specific AAA rules which authorized "any remedy," (2) involved factual findings of fraud upon which the punitive award was based, and (3) the court explicitly distinguished its ruling from labor arbitrations where, such as here, no finding of fraud or bad faith conduct exist.

The Eleventh Circuit affirmed on appeal but made the following findings. *First,* the punitive damages were awarded for willful fraud. *Willoughby,* 776 F.2d at 270. *Second,* the Court stated that "punitive damages . . . may not be recovered for pure breach of contract at any rate." *Id.* at 270 n.1. Here, all Arbitrator Mathews found was that the Company simply breached the contract. *Willoughby* fully supports the Arbitrator's initial action in refraining from awarding punitive damages and the Eleventh Circuit's refusal to resurrect the Union's claim for punitive damages. As a result, the Union here has made no showing that either *Willoughby,* the decision below, or any other Eleventh Circuit ruling on punitive damages is in clear conflict with any other Circuit's holding.

Because none of the cases relied upon by the Union are applicable to the instant matter, the Union has failed to identify a split in the Circuits on the issue of whether or not a punitive damage award was proper. Moreover, as noted above, Arbitrator Mathews in this matter specifically held that punitive damages were not appropriate in this matter, because he did not find the

bad faith or wanton or willful misconduct that he interpreted would be necessary in order to support a punitive damages award. 995 F.2d at 1032; 825 F. Supp. at 1031. In sum, the case law in and out of the Eleventh Circuit consistently holds that in the labor arbitration context, absent either an explicit provision for punitive damages, or a finding of willful or bad faith misconduct, the granting of punitive damages is prohibited. Accordingly, there is no basis for granting the Petition in the instant matter.

II. THERE IS NO RELEVANT CONFLICT IN THE CIRCUITS CONCERNING AN EMPLOYER'S WAIVER OF A DEFENSE IN AN ARBITRATION, BECAUSE GEORGIA POWER AT NO TIME WAIVED ANY OF THE DEFENSES WHICH IT URGED IN THE DISTRICT COURT AND THE ELEVENTH CIRCUIT.

In arguing that the Company waived any argument that the monetary award granted by Arbitrator Mathews was improper, the Union grossly misrepresents the record. Contrary to the Union's assertion, from the very first post-hearing brief and throughout the arbitration, the Company challenged the permissibility of any monetary award, because any such award would be punitive in nature. The Company's opposition to any such award was recognized by the Arbitrator in his second opinion. (Stipulation of Record, Exh. L, p. 10). He further acknowledged the Company's position that "[a]ny monetary award in the case would be punitive because the union had not shown that any bargaining unit member had suffered any monetary or other loss as a result of the Incentive Program." *Id.*, p. 12. The Arbitrator also retained his finding that punitive damages were not appropriate in his opinion making a monetary award: "The Arbitrator rejected that argument of the Union [punitive damages]on page 58 of the tentative opinion and award, and, upon reconsideration, adheres to the original determination." *Id.*, p. 16).

Moreover, at the Paragraph 69 hearing held on June 18, 1990, the Arbitrator would not allow the remedy issue to be framed, and cut the Company off when it attempted to state the issue. Prior to being cut-off, the Company stated that the remedies

available to the Arbitrator did not include punitive damages. (Stipulation of Record, Exh. M, pp. 8-9).

The Arbitrator also had no difficulty understanding that he was not "empowered" to act beyond providing compensatory relief *consistent with the agreement,* as is shown by the recitation at the conclusion of his final opinion:

> The second tentative award, making a monetary award of damages, draws its essence from the Contract, and while the Company may disagree with the Impartial Chairman's finding of fact and application of the meaning of the provisions of the Agreement, the compensatory award to those employees discriminated against is based upon the content and meaning of the provisions of the Agreement.

(Stipulation of Record, Exh. R, p. 20). There is no basis in the record to support the Union's notion that the Arbitrator was at any time empowered to reach beyond the Agreement to formulate an award based on his personal notions of industrial justice, and the Arbitrator obviously did not interpret the submission as so empowering him. Indeed, the Union does not dispute that the parties had no past practice or prior recognition of the allowance of punitive damages, nor does the Union dispute, as the District Court held, that the Agreement specifies only back pay and reinstatement as permissible remedies.

The Union's citation to cases to support their submission and waiver argument is as flawed as their use of the record in this regard. It is axiomatic that when parties engage in a generic framing of an issue in arbitration, parties do not submit to a remedy that would "be contrary to the basic labor-management relations agreement between the parties." *Local 1837, Intern. Broth. v. Maine Public Service Co.,* 579 F. Supp. 744, 753 (D. Me. 1984). Failing to recognize this premise, the Union is unable to support

its position with relevant authority.[4] Moreover, there can be no waiver without a party's explicit agreement to waive a defense or the party's repeated unwillingness to assert the defense. Here, where the record shows without dispute an on-going pattern of both the Company and the Arbitrator recognizing and asserting the impermissibility of punitive damages, the argument of waiver is frivolous at best. Indeed, the Union's own cases support such a conclusion.

In *Capital City Tel. Co. v. Communication Wkrs.,* 575 F.2d 655 (8th Cir. 1978), the employer sought money damages and injunctive relief against the union for violating a no-strike clause. The district court referred the case to arbitration. The arbitrator found a contract violation but denied damages. The employee appealed, contending the damage issue should have gone to a trial before the district court.

The court found first that the parties had specifically stipulated to have the damage issue decided by the arbitrator, and second the employer had never challenged the arbitrator's right to decide the damage issue until it lost. *Id.* at 658. In the present case, the Company challenged the right to award punitive damages from the start. Moreover, in *Capital City,* the Union also cites to two Seventh Circuit subcontracting decisions, *Jones Dairy Farm v. Local No. P-1236,* 760 F.2d 173 (7th Cir. 1985), and *Dreis & Krump Mfg. v. IAM,* 802 F.2d 247 (7th Cir. 1986). Again, these cases are totally inapplicable. In *Dreis & Krump,* 802 F.2d 247, the arbitrator ordered the cancelling of subcontracting decisions which violated the contract (as conceded by the employer) and ordered back pay.

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[4] The Union's misstatements throughout this litigation and bargaining history seeks to obscure the public policy implications of affirming awards such as this. In the context of labor arbitration "[P]unitive actions are disfavored; the award of punitive damages in the midst of a steady stream of arbitrations between a company and its unions might well undercut both sides 'confidence in the arbitration process and decrease their commitment to this essential aspect of industrial self-government.' " *Raytheon Co. v. Automated Business Systems, Inc.,* 882 F.2d 6, 10 (1st Cir. 1989), *quoting United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 580, 80 S. Ct. 1347, 1351 (1960).

The Company never protested or challenged the submission of the subcontracting issue. *Id.* at 252. In *Jones Dairy Farm,* the arbitrator simply forbade the employer the right to contract out janitorial work based on his interpretation of an NLRB decision. *Jones Dairy Farm,* 760 F.2d at 174-75. There was no issue of punitive damages, and the employer had explicitly agreed to submit the contracting issue. *Id.* at 175-76.

In the Eleventh Circuit, "the law is well-established that an arbitrator 'can bind the parties only on issues that they have agreed to submit to him.' " *Butterkrust Bakeries v. Bakery, Conf. & Tobacco Workers,* 726 F.2d 698, 700 (11th Cir. 1984), quoting from *Piggly Wiggly Ops. W'house, Inc. v. Piggly Wiggly Ops. W'house Ind. Truck Driver's Union,* 611 F.2d 580, 583 (5th Cir. 1980). Where an arbitrator decides an issue which was not submitted to him, the arbitrator's decision exceeds the scope of his authority and is unenforceable. *Metro Chevrolet v. Union de Tronquistas,* 835 F.2d 3, 5 (1st Cir. 1987); *St. Louis Theat. Co. v. St. Louis Theat Bhd.,* 715 F.2d 405, 409 (8th Cir. 1983); *Aeronautical Mach. Lodge 709 v. Lockheed-Georgia,* 521 F. Supp. 1327, 1329 (N.D. Ga. 1981). In the present matter, it is clear that (1) the issue of punitive damages was never submitted to the Arbitrator; (2) the Company repeatedly and in a timely manner denied the availability of a punitive damages remedy; (3) the Arbitrator explicitly denied the availability of a punitive damages remedy; and (4) the case law in and out of the Eleventh Circuit supports a finding that no explicit or applied waiver of the defense could have taken place here. Since the Union cannot show relevant authority to support a waiver, the Petition should be denied.

III. THE ELEVENTH CIRCUIT'S OPINION IS NOT BASED IMPROPERLY ON A FINDING OF A MISTAKE OF LAW BY THE ARBITRATOR.

The Union's contention that the Arbitrator simply made a mistake of law, which is not subject to judicial review is untenable, and grossly misrepresents the basis of the District Court's and Court of Appeals' decisions. Contrary to the Union's assertion, there exists no Supreme Court precedent which conflicts with the

opinions below. The general rule of deference to arbitration awards applies only when the arbitrator is acting pursuant to the terms of the collective bargaining agreement. The powers of an arbitrator are not unlimited, and he is bound by the terms of the contract from which he claims his authority. *Monongahela Power Co. v. Local No. 2332,* 566 F.2d 1196, 1198 (4th Cir. 1976). As the Supreme Court held in *United Steelworkers of Am. v. Enterprise Wheel & Car Co.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 1361 (1960), the arbitrator does not sit "to dispense his own brand of industrial justice . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." The effect of *Enterprise Wheel* and its progeny, particularly in the Eleventh Circuit, is that when an arbitrator's award violates or conflicts with the terms of the bargaining agreement, constitutes a ruling beyond the scope of the arbitrator's authority, or is irrational or arbitrary, that award is to be vacated. *Bruno's, Inc. v. United Food & Comm. Wkrs.,* 858 F.2d 1529, 1531 (11th Cir. 1988).

The Eleventh Circuit affirmed the vacation of the award here not on the basis of mistake of law, since even the Arbitrator acknowledged the unavailability of punitive damages. Rather, the award was vacated solely on the basis of the Arbitrator's own findings of fact and conclusions of law. It was the Arbitrator's inexplicable failure to align the award with his own findings which warranted vacating the award.

The fundamental and most disturbing irrationalities of the award are that the Arbitrator found (1) no basis, either in the Agreement or in the Company's conduct, to award punitive damages; (2) the non-participants suffered no compensable loss; (3) no basis that the non-participants would have ever participated in the Program; and (4) the participants earned their incentive pay. An award which is unenforceable in reason and fact manifests an infidelity to the arbitrator's obligation to frame an award which draws its essence from the bargaining agreement. *Washington Hosp. Center v. Service Employees Intern.,* 746 F.2d

1503, 1514 n.13 (D.C. Cir. 1984); *Intern. Ass'n. of Machinists, Etc. v. Modern Air Transp. Inc.*, 495 F.2d 1241, 1244 (5th Cir. 1974).

As the Eleventh Circuit held here, once the Arbitrator found no basis for punitive damages, his own findings of fact foreclosed the awarding of any such damages. 995 F.2d 1030. *Enterprise Wheel* and its progeny stand for the proposition that an arbitrator need not explain his rationale and that any ambiguity be resolved in favor of confirmation of the award. *Enterprise Wheel,* does not however, authorize the confirmation of an award where, as here, the Arbitrator does provide the underlying rationale and such rationale indicates a disregard for the Arbitrator's own findings of facts. *U.S. Postal Serv. v. Nat. Ass'n. of Letter Carriers,* 847 F.2d 775, 778 (11th Cir. 1988); *Teamsters, Local 814 v. Sotheby's, Inc.,* 665 F. Supp. 1089, 1094 (S.D. N.Y. 1987). As the District Court held below, once the Arbitrator made formalized findings and offered reasons for his decision, the court could properly consider them. 825 F. Supp. at 1032, citing *United Electrical, Radio and Machine Workers of America, Local 1139 v. Litton Microwave Cooking Products,* 704 F.2d 393, 397 (8th Cir. 1983).

As the Court stated in *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 371 (1987), "the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *See also Enterprise Wheel,* 363 U.S. at 597, 80 S.Ct. at 1361. Here, it is apparent from the face of the Arbitrator's opinion that he blithely ignored his own findings in order to manufacture his preferred outcome.

It is axiomatic that it was not within the Arbitrator's authority to decide "whether he [liked] the terms of [the Agreement] and change them to suit his decision." *Florida Power Corp. v. Int'l Bhd. of Electrical Workers,* 847 F.2d 680, 685 (11th Cir. 1988) (Garza, J. dissenting); *Int'l Union of Oper. Engineers v. Kerr-McGee Refining Corp.,* 618 F.2d 657, 660 (10th Cir. 1980). The Arbitrator's characterization of the award as compensatory, in the complete absence of any evidence of a monetary loss, and his awardance of damages

despite his own finding that punitive damages were not warranted, are irrational and take his award outside the scope of non-reviewable arbitration decisions. Indeed, it is well accepted that an arbitrator "may not shield an 'outlandish disposition of a grievance' from judicial review simply by making the right noises — noises of contract interpretation." *Leed Architectural Products v. United Steelworkers of America,* 916 F.2d 63, 65 (2d Cir. 1990) (quoting *Marine Pollution Serv., Inc.,* 857 F.2d 91, 94 (2d Cir. 1988), and *Ethyl Corp. v. United Steelworkers of America,* 768 F.2d 180, 187 (7th Cir. 1985), *cert. denied,* 475 U.S. 1010, 106 S.Ct. 1184 (1986)). As the Eleventh Circuit properly held, the Arbitrator could not impermissibly award punitive damages simply by recasting them as compensatory. 995 F.2d at 1032.

In sum, the Eleventh Circuit vacated the award based on the Arbitrator's own findings and his gross failure to keep faith with those findings. There is no Supreme Court case law which protects such arbitral excess, and the Union has not offered any authority to support reinstatement of the award. As a result, the Petition should be denied.

CONCLUSION

For the foregoing reasons and on the authorities cited, the Court should decline to grant the Writ of Certiorari to the Eleventh Circuit Court of Appeals because the questions were correctly decided under the relevant federal labor law and the questions do not present any issues that would merit this Court exercising its discretion to review this case.

Respectfully submitted this 6th day of April, 1994.

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